VIRGINIA
LAW REVIEW

VOL. I. DECEMBER, 1913 No. 3

THE FEDERAL EMPLOYERS' LIABILITY ACT.

AS A PART of Mr. Roosevelt's program of railroad legislation, Congress, in June, 1906, passed an Act "relating to the liability of common carriers * * * to their employees." The salient features of the Act were that it rendered any common carrier by railroad, engaged in interstate commerce, liable for an injury to or death of an employee resulting from its negligence or that of "any" of its officers, agents or employees. The fellow servant doctrine was thereby abolished; contributory negligence became no longer a bar, but merely went in mitigation of damages, except that it has no effect at all where the injury was due to a violation by the carrier of the safety appliance acts; and common-law rules of liability were otherwise modified.

The constitutionality of this Act was at once suggested and was formally raised in the case of Howard *v.* Ill. Central Ry. Co., commenced in the United States Circuit Court at Memphis. When the case went to the Supreme Court, Mr. Justice White wrote the opinion and held the Act unconstitutional as beyond the powers of Congress, in that it undertook to regulate the relation of carrier and employee in the States, even where they were not engaged in interstate commerce. Mr. Justice Day concurred in this view and Mr. Justice Peckham, Mr. Justice Brewer and the Chief Justice, while not agreeing to all that was said in the opinion, concurred in the result. Mr. Justice Moody, with whom concurred the other three justices, wrote an elaborate opinion to the effect that, properly construed, the Act did not undertake to regulate the relation of carriers and employees when not engaged

in interstate commerce. The result, however, was that the Act was declared unconstitutional.[1]

Promptly after the announcement of this decision, Congress, in April, 1908, passed a new act so worded as to avoid the constitutional objections to the original Act, and this is the Act now in force, its constitutionality having been sustained in Mondou *v.* New York, etc., Ry. Co.[2] Only two amendments have since been made.

One of these amendments was to meet the view announced by Judge Simeon E. Baldwin, of the Connecticut Supreme Court, in Hoxie *v.* New York, etc., Ry. Co.,[3] where it was held that there was no jurisdiction in a State court to entertain an action under the Federal Act, even in a case within its provisions, where the State legislation was at variance with it. This amendment, therefore, provided specifically that the jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States.

It proved afterwards that this amendment was unnecessary as the Federal Supreme Court, in the case of Mondou *v.* New York, etc., Ry. Co.,[4] reversed the holding of the Connecticut Supreme Court and declared that, as to cases within its provisions, the Federal Act was supreme and exclusive; that the right of action created by it could be asserted in the State courts; and that it operated as a repeal of all inconsistent State legislation.

The other amendment passed at the same time (April 5, 1910), provided that any right of action given by the Act to a person injured shall survive to his or her personal representative for the benefit of the surviving widow, or husband, and children of the employee, and if none, then of the employee's parents, and if none, then of the next of kin dependent upon the employee, but in such cases only one recovery may be had for the same injury. The purpose and effect of this amendment is considered later on.

The questions which most frequently arise under this Act and which will be discussed somewhat briefly here are: (1) what cases come within the Act; (2) what is the measure of recovery;

---

[1] Howard *v.* Ill. Central Ry. Co., 204 U. S. 463.
[2] 223 U. S. 1.
[3] 82 Conn. 352.
[4] 223 U. S. 1.

and (3) how far the question of the defense of assumption of risk has been abolished. Taking these up in their order:

What Cases Are within the Act?

In order for the Act to apply, the essentials are that the employer must be a common carrier by railroad engaged in interstate commerce, the employee must be employed in such commerce, and the injury must be due, wholly or in part, to the negligence of an officer, agent or employee of the carrier, or to a defect or insufficiency, due to negligence, in the carrier's cars, engines, machinery, track, roadbed or other equipment. See Shade *v.* Nor. Pac. Ry. Co.[5] For convenience the first section is quoted:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

At first there was a great contrariety of opinion in the circuit courts and in the circuit courts of appeals, some favoring a strict construction and others an ultra-liberal construction. The atmosphere was considerably cleared, however, by the decision of the Federal Supreme Court in what is known as the Pedersen case. There the plaintiff was an iron-worker employed by the defendant carrier in the alteration and repair of its bridges and

---

[5] (D. C.), 206 Fed. 353.

tracks near Hoboken, N. J. On the afternoon of his injury, he and another employee, acting under the direction of the foreman, were carrying from a tool car to a bridge known as the Duffield Bridge some bolts or rivets, which were to be used by them that night or the next morning in repairing that bridge, the repairs to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James Avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying the bolts across the James Avenue bridge on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train of the defendant, of the approach of which the engineer negligently failed to give any warning. The court, after a review of the facts, held that the plaintiff was employed in interstate commerce and that his case was within the operation of the Federal Act. The true test was declared to be this: "Is the work in question a part of the interstate commerce in which the carrier is engaged?"

In response to the suggestion that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein, the court said there was no merit in it because it was necessary in the repair of the bridge that the materials be at hand and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one "as in the case when an engineer takes his engine from the round house to the track on which are the cars he is to haul in interstate commerce." Citing Lamphere *v.* Oregon, etc., Co.,[6] and other cases.

Another case is St. Louis, etc., Ry. Co. *v.* Seale.[7] It there appeared that the deceased was employed by the defendant at North Sherman, Tex., as a yard clerk. His principal duties were to examine incoming and outgoing trains and to make a record of the numbers and initials of the cars, to inspect and make a record of

[6] (C. C. A.), 196 Fed. 336.

[7] 229 U. S. 156.

seals on the car doors and to put cards and labels on the cars to guide switching crews in breaking up incoming and making up outgoing trains. His duties thus related both to interstate and intrastate traffic and at the time of his injury he was on his way through the yard to meet an incoming freight train from Oklahoma composed of several cars, many of which were loaded with freight. His purpose was to take the numbers of the cars and otherwise perform his duty in respect of them. While thus engaged he was struck and fatally injured by a switch engine claimed to have been negligently operated by other employees in the yard. The court held that the case was clearly within the operation of the Act.[8]

In N. & W. Ry. Co. *v.* Earnest [9] an employee was injured while piloting a locomotive (by walking in advance of it) through several switches in the railroad yards to a main track where the locomotive was to be coupled to an interstate train to assist it in moving up a grade in the direction of the next station. It was held that such a case was within the Act.

In Walsh *v.* New York, etc., Ry. Co.[10] the plaintiff at the time of his injury was engaged in replacing a draw-bar upon a car used in interstate commerce, and the case was held to be within the Act.

In Central Ry. Co. *v.* Colasurdo [11] a track-walker engaged in repairing a switch in the railroad yards, those yards being used by intrastate and interstate trains alike, was held to be within the protection of the Act.

In Northern Pac. Ry. Co. *v.* Merkle [12] the Circuit Court of Appeals for the Ninth Circuit held that the Act embraced the case of an employee engaged at the railroad shops in making repairs upon a refrigerator car which had theretofore been used in interstate commerce and was intended to be again so used when repaired, although the repairs in question were substantial in their nature and required at least a partial dismantling of the car, which had been in the shops two days when the accident oc-

[8] See also, Bethune *v.* Central Vt. Ry. Co. (C. C. A.), 206 Fed. 868.
[9] 229 U. S. 114. [10] 223 U. S. 5.
[11] (C. C. A.), 192 Fed. 901 (appeal dismissed, 33 Sup. Ct. 111).
[12] (C. C. A.), 198 Fed. 1.

curred. This case was cited with apparent approval in the opinion in the Pedersen case above referred to.

In Lamphere *v.* Oregon, etc., Ry. Co.[13] a locomotive fireman in the employ of an interstate railroad company was held to be employed in interstate commerce while on his way to the station at which he was to take a train for transportation with other employees to another station, where they were to relieve the crew of an interstate train, and who, while approaching the station over a crossing, was struck and killed by an interstate train negligently operated by other servants of the company.

A case which appears to go even further than any of these is that of Law *v.* Illinois Central Ry. Co., decided by the Circuit Court of Appeals for the Sixth Circuit, November 4, 1913. The plaintiff was a boiler-maker's helper employed at the defendant's shops in Memphis, and at the time of the accident he was helping the boiler-maker, Morgan, in repairing a "petticoat" for a freight engine theretofore regularly used in interstate commerce. While at this work he was injured through the alleged negligence of Morgan. The engine was in the roundhouse, having been put there three weeks earlier and having been dismantled for the purpose of making this and other repairs, but it was destined, upon the completion of these repairs, for return to use in interstate commerce and was later so returned. The court held that the case was within the Federal Act.

If the doctrine of this last case is sustained by the Supreme Court, it will mark an extreme and will probably mean that the Act must control the rights and liabilities of railroad employees and their employers in all cases where the employee is engaged in repairing an instrumentality of interstate commerce.

The argument has been made that if, as in this and the Pedersen case, the Act applies wherever the employee is engaged in the repair of an instrumentality theretofore and thereafter to be used in interstate commerce, then it would naturally follow that an employee engaged in the construction of an instrumentality which was to be used in such commerce would be equally within the Act. This would embrace employees of an interstate railroad

[13] (C. C. A.), 196 Fed. 336 (cited with apparent approval in the Pedersen case).

company engaged in getting out ties or in making rails or switch bars or cars in the shops—indeed, it would embrace such employees while on their way to work in such shops and while returning home therefrom. It would likewise embrace all employees engaged in track construction work and while going to and returning from such work.

Whether the Act will be so abnormally extended is doubtful, in view of the language of the Supreme Court in the Pedersen case,[14] where it was said:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars, which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In Illinois Central Ry. Co. *v.* Porter [15] the employee, with his fellow truckman, was loading interstate freight from the company's warehouse into its cars. He was injured through encountering a truck negligently handled by another employee in the car, and it was held that the case came within the Federal Act.

Other interesting cases held to come within the Act are: Illinois Central Ry. Co. *v.* Nelson,[16] which was a case where a railroad brakeman, after obtaining ice with which to cool hot boxes on an interstate train, started across tracks where switching was being done and was struck by a moving train; Freeman *v.* Powell, Rec'r,[17] where an employee whose duty it was to keep passenger cars, local and interstate, supplied with ice, while attempting to lift a block of ice, was injured, owing to the failure of the carrier to supply proper ice hooks; B. & O. Ry. Co. *v.* Darr [18] where an employee, whose duty it was to make repairs, was replacing a bolt which had been lost from the brake shoe of a tender attached to an engine. The engine and tender were used in hauling interstate trains and had reached the end of their run and were on

---

[14] 229 U. S. 146.
[15] (C. C. A.), 207 Fed. 311.
[16] (C. C. A.), 203 Fed. 956.
[17] (Tex. Civ. App.), 144 S. W. Rep. 1033.
[18] (C. C. A.), 204 Fed. 751.

what was known as a fire track awaiting the time of the return trip, which was a few hours later. Somewhat similar cases, though involving an application of the safety appliance acts, are: St. Louis, etc., Ry. Co. *v.* Delk [19] and Johnson *v.* So. Pac. Ry. Co.[20]

So far as the writer has been able to learn, the cases heretofore arising have been those of employees connected more immediately with the operating department of the railroad. But take the case of two employees engaged in the copying of interstate tariffs in the office of the General Freight Agent, far removed from the operation of actual transportation facilities. While they are thus at work, and in the course of its prosecution, one of the clerks, through negligence, injures his associate. Would such a case be within the Act? And would the Act embrace the case of a stenographer in the office of the General Solicitor who, while working on a brief in a case before the Interstate Commerce Commission, is injured by a fellow employee in the same office? It is not believed that it was the intention of Congress to include such case. However, it must be admitted that the Act makes no such exception, but makes the carrier liable for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

In this connection it is well to note that if the facts of the case bring it within the operation of the Act, it is important, particularly to the defendant, that the issue be made accordingly. For the judgment in an action brought by a widow in her individual capacity to recover damages for the death of her husband while employed in interstate commerce, the case being prosecuted and tried on the theory that it involves a cause of action under the State law, will not, whether for or against the defendant, bar a subsequent action by the widow as administratrix, brought under the Federal Act.[21] In such a case, however, in view of the rule that the jury, when requested, must apportion the damages, it is believed that the defendant would have the right to offset

[19] (C. C. A.), 158 Fed. 931, reversed in 220 U. S. 580.
[20] 196 U. S. 1.
[21] Troxwell *v.* Delaware, etc., Ry. Co., 227 U. C. 434.

against the widow's apportionment such sum, if any, as she may have recovered in the previous action.

Where the declaration sets forth a state of facts justifying the application of the Act, the rights and liabilities of the parties must be determined by the Act, notwithstanding the plaintiff may have attempted to base his right of action on the State statutes or the common law. A reference in the declaration to a State statute will not invalidate the pleading.[22] On the same principle it has been held that where the plaintiff, at the time of commencing her action, is uncertain whether, under the facts, she is entitled to recover under the Federal Act or the general law of negligence in force in the State, she may rely in one count of her petition on the former right of action and in another count on the latter, and the petition will not be invalid for misjoinder.[23] Similarly, a defendant carrier sued for the death of an employee while employed in interstate commerce is not estopped to urge that its liability must be measured by the Federal Act by having pleaded contributory negligence as a bar.[24]

The case of St. Louis, etc., Ry. Co. *v.* Seale,[25] is especially interesting in this connection. The petition of plaintiffs (the widow and parents of a deceased employee), as ruled by the State court, stated a case under the State statute. The defendant, by its special exceptions, called attention to the Federal Act and suggested the inapplicability of the State statute. The plaintiffs, with the sanction of the court, stood by their petition and the defendant was therefore obliged to make defense, a plea in abatement being unavailing. The evidence developed that the case was not under the State statute but under the Federal Act. "In short, the case pleaded was not proved, and the case proved was not pleaded." The court held that the defendant's objection, interposed at the conclusion of the testimony, was in due time and ought to have been sustained. The judgment in favor of the

---

[22] Missouri, etc., Ry. Co. *v.* Wulf, 226 U. S. 570.

[23] Bankson *v.* Ill. Cent. Ry. Co. (D. C.), 196 Fed. 171. This case was decided under the practice prevailing in Iowa. Whether a similar ruling would be proper in other States would depend largely on the State practice.

[24] St. Louis, etc., Ry. Co. *v.* Hesterly, 228 U. S. 702.

[25] 229 U. S. 156, reversing 148 S. W. 1099.

plaintiff was accordingly reversed and the case remanded for further proceedings "but without prejudice to such rights as the personal representative of the deceased may have."

The right of any beneficiary to share in the recovery must depend upon the pecuniary loss resulting to him. Therefore, a child not dependent on the decedent and with no reasonable expectation of any pecuniary benefit from the continuation of the decedent's life can have no share in the recovery.[26]

Where the action is commenced by a relative of the decedent in his individual capacity and to recover under the State statute, but the facts stated show a case under the Federal Act, the court may, and ordinarily should, allow an amendment so as to substitute the personal representative of the decedent as plaintiff, and this may be done although the statutory period of two years may have elapsed since the death of the decedent. Such an amendment does not state a new cause of action.[27]

The Measure of Recovery.

This question, so far as the Act of 1908 is concerned, was largely set at rest by the decision of the Federal Supreme Court in Michigan Central Ry. Co. *v.* Vreeland [28] the opinion in which was written by Mr. Justice Lurton, in which he pointed out that the damages recoverable are such as flow from the deprivation of the pecuniary benefits which the beneficiary might have reasonably received if the decedent had not died from his injuries.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary, and that is not the sole test. "There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived." Compensation for such loss cannot include damages by way of recompense for grief or wounded feelings or with a view of affording a solatium. However, the court, in defining what was meant by pecuniary loss, went on to say:

> "Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of the services of the

[26] Gulf, etc., Ry. Co. *v.* McGinnis, 228 U. S. 173.
[27] Missouri, etc., Ry. Co. *v.* Wulf, 226 U. S. 570.
[28] 227 U. S. 59.

husband, wife or child, and when the beneficiary is a child for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the services of another for compensation."

The trial court [29] after warning the jury that they could not allow any damages for the grief and sorrow of the widow and must confine themselves to a proper compensation for the loss of any pecuniary benefit which she would reasonably have derived from the decedent's earnings, added:

"In addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. W. and Mrs. W., namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. W. in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. W., her husband."

The Supreme Court declared that this "threw the door open to the widest speculation" and was a reversible error, and then proceeded to define the difference between the loss sustained by a widow in the death of her husband and that sustained by a minor child in the death of a father.

The principles of the Vreeland case were reaffirmed in a later case of American Ry. Co. *v.* Didricksen,[30] where the court pointed out that the loss to parents of the society and companionship of a son is not a pecuniary loss and, therefore, not an element of damage. Nor could the jury be instructed to take into consideration the loss of any "care and consideration" the son might have taken of them during his life, had he lived, where there was neither averment nor proof relating to the subject from which its pecuniary value could be estimated.

A few months later the court decided the case of Gulf, etc., Ry. Co. *v.* McGinnis,[31] where it was declared that the recovery must be limited to compensating only those relatives of the deceased employee for whose benefit the administrator sues as are

[29] 186 Fed. 496.
[30] 227 U. S. 145.
[31] 228 U. S. 173.

shown to have sustained some pecuniary loss. In consequence, a daughter not dependent on the decedent and with no reasonable expectation of any pecuniary benefit from the continuation of his life is not entitled to share in the recovery.

All of the foregoing cases, it should be noted, were based upon the Act as it stood prior to the amendment of April 5, 1910. That amendment provided:

> "Any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

What was the effect of this amendment? In a number of the cases pending in different parts of the country it was being argued on behalf of the railroad company that the fact that the injured employee survived his injuries for several hours operated to extinguish its liability for both the wrongful injury and the ensuing death, the view being that the Act declared a single liability and constituted a cause of action in behalf of the injured person, if he survived, or in case his death was instantaneous a cause of action for the benefit of the specified dependent relatives surviving—that where the employee survived his injuries for an appreciable length of time the right of action was his and died with him. This argument is referred to and met by Mr. Justice Lurton in his opinion in the Vreeland case.[32] He thought it too narrow an interpretation of the Act and added:

> "We think the Act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its injured servant. If he survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power. But if he does not live to recover upon his own cause of action, what then?"

---

[32] 227 U. S. 59.

He then proceeds to answer this question by holding that the obvious purpose of Congress "was to save a right of action to certain relatives dependent upon an employee wrongfully injured for the loss and damage resulting to them financially by reason of the wrongful death." [33]

Does the amendment of 1910 go any further than Mr. Justice Lurton declared the original Act to go? It is the judgment of the writer that it did not and that it was passed by Congress at a time when the argument denounced by Mr. Justice Lurton was being constantly made and was for the purpose of placing the matter beyond any question. In other words, if the Vreeland case had been decided sooner, the amendment of 1910 would have been regarded by Congress as unnecessary.

Under the Act as it existed prior to the amendment of 1910, there could be no recovery for the pain and suffering endured by the deceased.[34] If the argument above submitted is sound, this is still the rule.

No case has been found in which the Supreme Court has declared the effect of the amendment of 1910, and the only reference to that amendment seems to have been in the case of St. Louis, etc., Ry. Co. *v.* Hesterly,[35] where Mr. Justice Holmes, speaking for the court, after pointing out that in case of death the only action is one for the benefit of the next of kin, said:

> "The amendment of April 5, 1910, * * * in like manner allows but one recovery, although it provides for survival of the right of the injured person. The amendment, however, does not apply to this case, as the death occurred in August, 1909."

The question was sought to be raised in Ill. Cent. Ry. Co. *v.* Porter,[36] in which the death had occurred after the amendment of 1910, but owing to the state of the record the court declined to express an opinion.

---

[33] Michigan Central Ry. Co. *v.* Vreeland, 227 U. S. 59.

[34] Walsh *v.* New York, etc., Ry. Co. (D. C.), 173 Fed. 494, affirmed in 223 U. S. 5; Yazoo, etc., Ry. Co. *v.* Wright (C. C. A.), 207 Fed. 281, 287.

[35] 228 U. S. 702.

[36] (C. C. A.), 207 Fed. 314.

The necessity of averment and proof of actual pecuniary loss is not confined to cases where the next of kin (after the children and parents) are the beneficiaries, but extends to cases where the parents themselves are the beneficiaries.[37]

The language of the amendment of 1910 in stating for whose benefit the action will lie is identical with the language of the first section of the original Act. If, therefore, under the original Act the right of any beneficiary to recover was dependent upon averment and proof of actual pecuniary loss and limited to that —as has often been decided—there seems to be no reason why the same limitation on the recovery does not exist under the amendment. If this is true, it, of course, precludes any recovery for the pain and suffering endured by the deceased—or for anything else other than the pecuniary loss actually sustained by the beneficiaries.

The jury trying the case should apportion the damages among the several beneficiaries (where there are more than one).[38] In order to have this done, however, one of the parties must so request, and a failure to do this or, at least, a failure on the part of either party to make proper exception to a charge which does not so direct the jury, will cure a verdict in which such apportionment is not made.[39]

Assumption of Risk.

The Fourth Section of the Act provides:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

---

[37] Garrett *v.* Louisville, etc., Ry. Co. (C. C. A.), 197 Fed. 715; Ill. Cent. Ry. Co. *v.* Porter (C. C. A.), 207 Fed. 314.

[38] Gulf, etc., Ry. Co. *v.* McGinnis, 228 U. S. 173.

[39] Ill. Cent. Ry. Co. *v.* Porter (C. C. A.), 207 Fed. 314; Yazoo, etc., Ry. Co. *v.* Wright (C. C. A.), 207 Fed. 281.

Bearing in mind that this act is in derogation of the common law and applying the familiar rule of construction *expressio unius est exclusio alterius,* it would seem to be a proper conclusion that the defense of assumption of risk is interfered with only to the extent that the employee shall not be held to have assumed the risk of employment in cases where the violation by the carrier of some safety appliance act contributed to the injury or death of the employee.

The first rule of construction mentioned—that of *expressio unius*—is so well recognized that authority is hardly necessary. The same may be said of the other rule that a statute creating a liability where none theretofore existed at common law will be strictly construed.[40]

The defense of assumption of risk is largely based upon the principle of *volenti non fit injuria* and means that an employee ought not to recover where, knowing the danger, he voluntarily takes the chance of injury.

Much confusion arises in this connection between the defense of contributory negligence and of assumption of risk. The distinction between these two defenses has long been recognized and while, in particular cases, the line of demarcation may be faint, the respective principles governing the two doctrines are as distinct as can be. As observed in Railroad *v.* McDade:[41] "The question of assumption of risk is quite apart from that of contributory negligence."[42]

It must be remembered that danger does not mean injury, but a chance of injury. An employee knowing and appreciating the chance of injury comes within the rule of *volenti non fit* where he elects to go ahead and to take the chance of emerging safe.

Take the case of an engineer in charge of an engine operating along a track in the yards which he is not entitled to assume is clear. The corner of a freight car protrudes from a side track onto this track and creates a situation of possible harm. If the engineer proceeds without looking ahead and a collision occurs

[40] See Lewis-Sutherland Statutory Construction, page 1019.

[41] 191 U. S. 68.

[42] See also, Schlemmer *v.* Railway Co., 220 U. S. 16; St. Louis Cordage Co. *v.* Miller (C. C. A.), 126 Fed. 495.

with the car fouling the track, his act is one of contributory negligence and under the statute will merely mitigate the damages. If, however, he does look ahead and sees the car protruding over his track and still thinks there is a chance for him to get by safely, or else thinks that the result of a collision will be merely to shove the offending car out of the way, but it turns out that the results of the collision are disastrous, then the case is one in which he assumed the risk for that, seeing a situation of possible harm, he voluntarily took the chance.

A similar case would be that of an electric lineman in the midst of wires which he is attempting to repair. He knows that the insulation of these wires is imperfect. If he fails to exercise care and in consequence brings himself into contact with uninsulated wires, his act is one of contributory negligence. But if he voluntarily seizes hold of the wire, knowing that it may be dangerous and hoping that it will not be—believing of course that the chance of injury is remote—and it turns out that he loses his life that way, then his act is one of assumption of risk, in that he voluntarily took the chance.[43]

This idea that the defense of assumption of risk is based on *volenti non fit,* and that the defense remains open under the various Employers' Liability Acts, including the Act of Congress, finds support in the decisions construing the English Act and numerous acts which have been passed in the various states. The leading case in England is that of Thomas *v.* Quartermaine,[44] construing the Employers' Liability Act of 1880. The facts were that the plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came out suddenly so that the plaintiff fell back into the cooling vat and was scalded. The court delivered an interesting opinion and concluded with this remark:

---

[43] See Tel. Co. *v.* Conant (C. C. A.), 198 Fed. 624.

[44] L. R. 18 Q. B. Div. 685.

"The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger, and voluntarily run the risk. *Volenti non fit injuria.* The Employers' Liability Act of 1880 makes precision on this point necessary, and renders it important to remember that quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent and voluntarily encountered by the injured person."

In the case of Birmingham, etc., Ry. Co. *v.* Allen [45] the court placed the same construction upon the Alabama Act, declaring the reasoning of the court in the case of Thomas *v.* Quartermaine to be convincing and conclusive. The earlier case of Holburn [46] and the Walters case [47] were overruled in so far as they announced a contrary conclusion.

Another interesting opinion is that of Judge (now Mr. Justice) Holmes in the case of Mellor *v.* Merchants Co.[48] where he quotes at length from the opinion in the case of Thomas *v.* Quartermaine and adopts the conclusion as there reached.[49]

It is not practicable within the space of an article of this character to review the cases in detail, but the following [50] may be referred to as supporting the doctrine announced in Thomas *v.* Quartermaine.[51]

The question was squarely presented in the case of Cent. Vermont Ry. Co. *v.* Bethune.[52] It is not practicable here to review the facts or the very clear opinion by Judge Putnam; the interested reader can best examine the opinion for himself. The conclusion reached was that the Act of 1908 did not abolish the defense of assumption of risk except in cases where the accident

---

[45] 99 Ala. 359, 20 L. R. A. 457. [46] 81 Ala. 200.

[47] 91 Ala. 435. [48] 150 Mass. 362.

[49] See also the similar cases of O'Malley *v.* Gas Light Co., 158 Mass. 135, 47 L. R. A. 161; Gleason *v.* New York, etc., Ry. Co., 159 Mass. 68; Tenanty *v.* Boston Mfg. Co., 170 Mass. 73.

[50] American Mill Co. *v.* Hullinger, 161 Ind. 675; St. Louis, etc., Ry. Co. *v.* Ledford, 90 Ark. 543; Andrews *v.* Ry. Co., 96 Wis. 348; Gombert *v.* McKay, 201 N. Y. 27.

[51] L. R. 18 Q. B. Div. 685. [52] 206 Fed. 868.

resulted from the failure on the part of the carrier to comply with some safety appliance act.

Similar conclusions have been reached by all of the State courts, (so far as the writer can find), before which the question has come up.[53]

The question was sought to be raised in the case of Yazoo, etc., Ry. Co. *v.* Wright,[54] which was a suit by the widow of an engineer who was killed while operating an engine on a lead track in the yards through his allowing it to collide with a box car, the corner of which protruded over the lead track. The Court of Appeals held, however, that the facts did not justify the application of the doctrine and passed up the question as to what would be the effect of the Act in a proper case.

Another effort to present the question was made in the case of Norfolk, etc., Ry. Co. *v.* Earnest,[55] by an assignment that the trial court erred in refusing an instruction relative to the assumption of risk. The Court held, however, that the instruction was couched in such general and sweeping terms "that it was not calculated to give the jury an accurate understanding of the law upon that subject" and therefore its refusal was not error.

It should be remembered that at the time of the passage of the Act of 1908 there were three well recognized—"time tried and fire tested"—defenses commonly asserted by defendant railroad companies. These were the fellow servant doctrine, contributory negligence and assumption of risk. Congress undertook to deal with each of these three defenses. In the first section it entirely destroyed the doctrine of fellow servants by making the master liable for an injury to or death of an employee resulting from its negligence or that of "any" of its servants or agents. The defense of contributory negligence was dealt with in the third section where it was distinctly declared that such negligence should no longer be a bar to recovery, but should go merely in mitigation of damages (with a further provision that it should

[53] Hall *v.* Vandalia Ry. Co., 169 Ill. App. 12; Neal *v.* Idaho, etc., Ry. Co., 22 Idaho 74; Baker *v.* Kansas City, etc., Ry. Co. (Kan. Sup. Ct. 1913), 129 Pac. 1151; Freeman *v.* Powell, Receiver (Tex. Civ. App.), 144 S. W. 1033.

[54] (C. C. A.), 207 Fed. 281. [55] 229 U. S. 114.

be of no effect at all where the violation by the carrier of a safety appliance act contributed to the injury). The defense of assumption of risk was not dealt with other than as stated in the fourth section above quoted. So clear was the intent of Congress with respect to the first two defenses mentioned, that scarcely a question has ever been made as to what was intended.

In view of this, it would seem that the failure of Congress to abolish in precise terms the defense of assumption of risk and the specific provision that this defense should not exist where the injury or death resulted from the failure of the carrier to observe some safety appliance act, should make it clear that there was no intent on the part of Congress to interfere with this defense except to the extent indicated.

H. D. Minor.

MEMPHIS, TENN.